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IN THE

Supreme Court of the United States

October Term, A. D. 1930

No. 555

GEORGIA PUBLIC SERVICE COMMISSION and JAMES A. PERRY, ALBERT J. WOODRUFF, WALTER R. McDONALD, CALVIN W. PARKER, and PERRY T. KNIGHT, as COMMISSIONERS THEREOF,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,
Appellees.

Consolidated With

STATE HIGHWAY BOARD OF GEORGIA, et al.,
Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Appellees.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

May it please the Court:

The undersigned, as counsel for The American Short Line Railroad Association, an unincorporated associa-

tion of short line railroads, which was a party to the proceedings before the Interstate Commerce Commission, known as *I. C. C. Docket No. 17517*, for and in behalf of certain of its member short line railroads which it represented in said proceedings before the Interstate Commerce Commission, respectfully move this Honorable Court for leave to file the accompanying brief in this case as amici curiae.

MOULTRIE HITT,
G. KIRBY MUNSON,
BEN B. CAIN,
Counsel for The American Short Line Railroad Association,
Union Trust Building,
Washington, D. C.

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Appellees.

Brief of Ben B. Cain, Moultrie Hitt and G. Kibby Munson, as Amici Curiae, in Support of Appeal

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OPINIONS

The opinion of the specially constituted District Court, refusing an interlocutory injunction, is reported as *Georgia Public Service Commission et al. v. United States et al.*, 39 Fed. (2d) 167. The final opinion of the same Court, holding valid the order of the Interstate Commerce Commission, and dismissing the bills, is reported under the same title, 42 Fed. (2d) 467.

The Commission's order sought to be set aside in this proceeding appears in *Rates on Chert, Clay, Sand and Gravel Within State of Georgia*, 160 I. C. C. 309 (R. 88).

STATUTES

The only statutes involved in this case, save the procedural laws governing the filing of the suit and the appeal, are the Interstate Commerce Act and acts amendatory thereof. The material sections hereinafter referred to are printed as Appendix "B" to this brief.

PRELIMINARY STATEMENT

The petition upon which the Interstate Commerce Commission instituted its investigation of Georgia intrastate rates on chert, clay, sand and gravel, and other allied commodities (hereinafter collectively referred to as sand and gravel) under Section 13 of the Interstate Commerce Act was filed by the Atlantic Coast Line Railroad Company and eight short line railroads operating in the State of Georgia (R. 188). The Commission's order of inquiry made all the railroads operating within the State of Georgia respondents (R. 204). The American Short Line Railroad Association, through its Traffic Manager at Atlanta, Georgia, acted for and in behalf of a majority of the short line railroads respondents in that proceeding. It is therefore an appellant *in spirit* before this Court.

Prior to the filing of such petition the Georgia Public Service Commission had prescribed by its order of February 25, 1925, certain maximum scales of so-called *single-line* and *joint-line* rates which the short line petitioners believed were unduly low and would operate to further accentuate their already depressed financial condition (R. 188).

The objective sought by the short lines was an authorization for a higher level of rates *coupled with authority to apply such lesser rates* as would enable the producers of sand and gravel located on the short lines to meet on even terms the competitive producers located on large lines (R. 475-6).

The investigation of Georgia intrastate rates by the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act, as amended, was coupled with the consideration of interstate rates on the same commodities, and resulted in a first, second and a third report and order in the same proceedings.

(1) The First Report and Order—Jan. 21, 1927—122 I. C. C. 133

In its first report and order herein, 122 I. C. C. 133 (R. 12), at page 169, the Interstate Commerce Commission referred to the broad-minded attitude of the Georgia Commission, and stated that, considering the results brought about by the Georgia Commission's said order of February 25, 1925, *it could not be found from the record to have brought about a rate situation which had in the past been unjustly discriminatory*

against interstate commerce. Hence the Commission made no order as to Georgia intrastate rates. It did, however, prescribe a new system of *interstate* rates *as a maximum.* The new system of *interstate* rates *departed from the Commission's usual principles* (Appendix A hereto), and consisted of an admittedly low basic scale of rates for single line hauls, coupled with an *intended-to-be-compensatory* permission to the carrier to offset the loss of revenue from sub-normal single line rates, to charge a substantially higher scale of rates for joint line hauls. (R. 52).

This unexpected solution naturally would not be unacceptable to the Class I roads and to the producers located on Class I roads, but it was to the disadvantage of the short line railroads and the producers located on the short line railroads.

"... a single scale without joint-line arbitraries has great practical advantages, particularly in simplicity of tariff construction, and can be justified upon other grounds as well. In the case of the commodities under consideration, however, there is, perhaps, more basis for joint-line arbitraries than in the case of any other form of traffic. The very low value of these commodities makes the cost of transportation a most vital matter, *and it may well be that even the slight increase in rate level over the single-line routes which the elimination of joint-line arbitraries would entail ought to be avoided.* Undoubtedly the greater proportion of this traffic moves over such routes. At all events we have reached the conclusion that in the case of these commodities joint-line arbitraries may reasonably be permitted, but should be of lesser amounts and disappear at an earlier stage of the scale than the carriers propose. But this should not be construed as an indication that we favor joint-line arbitraries in the case of traffic of higher grade." (Italics supplied.) (122 I. C. C. 133, 164.) (R. 52.)

(2) The Georgia Commission's Action Following the Interstate Commerce Commission's First Report and Order

The Georgia Commission, *in the light of the said first report and order* of the Interstate Commerce Commission of January 21, 1927, *122 I. C. C. 133* (R. 12), and after a further hearing, next prescribed a revised schedule of one-scale rates for both single-line and joint-line hauls (R. 76). With minor differences, the new Georgia scale corresponded to the scale prescribed by the Interstate Commerce Commission for single-line hauls, hence the controversy herein is really motivated more by the complications and ill-adjustments which result from a double scale of rates than from the *level of rates* prescribed by the single-line scale.

(3) The Second Report and Order, March 5, 1928—140 I. C. C. 85

The second report and order by the Interstate Commerce Commission of March 5, 1928, *140 I. C. C. 85*, relates to incidental phases not immediately involved and it is not necessary to consider the same herein.

(4) The Third Report and Order, December 9, 1929—160 I. C. C. 309

The third report and order of the Interstate Commerce Commission of December 9, 1929, *160 I. C. C. 309* (R. 88), is the one directly involved in this proceeding, for it is the validity of that report and order which is in question.

Said third report and order undertakes to substitute for the latest Georgia Commission one-scale *maximum* system of rates a combined scale of *maximum and minimum* single-line and joint-line rates corresponding to its own maximum (but not minimum) scale of interstate single and joint-line rates. Therefrom arise the many examples of uncertainty, inconsistency, complications, and difficulty so well described in the brief for the Georgia Public Service Commission, Appellants, that it will save the time of the Court not to multiply additional examples herein.

The position of The American Short Line Railroad Association is not that the Interstate Commerce Commission has no jurisdiction in a proper case, supported by proper evidence and on proper findings, to enter an order for the removal of undue or unreasonable advantage, preference, or prejudice, as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against or burden upon interstate commerce under Section 13 (4) and/or under Section 15-a of the Interstate Commerce Act, but that the order of the Interstate Commerce Commission here under attack is invalid because it is not a proper order, supported by proper findings, or properly supported by evidentiary facts which are essential to the exercise by the Commission of any jurisdiction herein.

ASSIGNED ERRORS TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed to the following assigned errors (R. 174, 175, 176, 177, 178):

The Court erred:

1. In not concluding and decreeing that there was no adequate finding by and no substantial evidence before the Interstate Commerce Commission authorizing or justifying that Commission in regulating and prescribing intrastate rates on sand, gravel, clay gravel, crushed stone, and slag within the State of Georgia and in not enjoining and annulling the orders of such Commission sought to be enjoined and annulled in this cause.

2. In not enjoining and annulling the orders of the Interstate Commerce Commission sought to be enjoined herein, for the reason that said orders are erroneous and invalid because they purport to rest on the principle that the rates ought to be higher for so-called joint line movements over the lines of two or more carriers than for corresponding distances over the individual line of a single carrier, and there was no evidence before the said Commission tending to establish or support such principle or to show that transportation over joint lines is necessarily more expensive than over single line routes.

3. In not enjoining and annulling the orders of the Interstate Commerce Commission sought to be enjoined herein, for the reason that aforesaid reports and orders are erroneous and invalid because the record of evidence on which they were entered does not show the transportation condi-

tions, or the circumstances and conditions under which aforesaid materials actually are transported for the respective intrastate movements within the State of Georgia and interstate movements into and out of said state, and, therefore, the record affords no basis for determining the similarity or dissimilarity of the actual services under said intrastate rates, on the one hand, and under the interstate rates, on the other hand.

4. In not enjoining and annulling the orders of the Interstate Commerce Commission sought to be enjoined herein, for the reason that they are erroneous because there is no substantial evidence of record in the proceedings wherein they are entered warranting or requiring a finding that the rates for transportation of the materials in question now charged, or which are made or imposed by authority of the State of Georgia, or any of said rates, for said interstate transportation, cause any undue or unreasonable advantage, preference or prejudice, as between persons or localities in intrastate commerce in the State of Georgia, on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, or any burden upon interstate or foreign commerce; and, in fact, the aforesaid intrastate rates are not preferential, or prejudicial, or discriminatory, or burdensome.

5. In not enjoining and annulling the orders of the Interstate Commerce Commission sought to be enjoined herein, for the reason that the aforesaid reports and orders are erroneous and invalid, because the said Commission therein undertakes to require reductions in intrastate rates within the State of Georgia, which are wholly beyond the

jurisdiction of said Commission to reduce under Section 1 of the Interstate Commerce Act, par. 2, sub par. (a); and because the rates therein required tend to create and will create unjust discriminations and undue preferences as among different and competing shippers and producers of said materials in Georgia, in violation of the statutes of said state governing such intrastate transportation.

SUMMARY OF ARGUMENT

The Interstate Commerce Commission has in this case no authority or jurisdiction to establish intrastate rates within the State of Georgia because (1) the Commission made no findings of fact sufficient to justify the conclusion that there existed any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce in Georgia on the one hand and interstate commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce, and (2) that there was before the Commission no evidence of record sufficient to have supported such a finding.

ARGUMENT

The Jurisdiction of the Interstate Commerce Commission

Text: *"For the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic."—American Express Company v. South Dakota, 242 U. S 617, 625, 61 L. Ed. 1352, 1358.*

In its decision of January 5, 1931, in *Florida et al. v. The United States*, 75 L. Ed. (Adv. 212), this Court repeated what it has in substance said before, i. e., that the power of Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against interstate commerce is not open to dispute, and that, in the exercise of this power, the Congress has given to the Commission authority not only to remove an undue prejudice as between persons or localities, but to establish a statewide level of intrastate rates when this is found necessary to accomplish the purpose of the statute. This Court went on to say, as may properly be said in this case, that the question is not one of authority but of its appropriate exercise, and the propriety of that exercise must be tested by its relation to the purpose of the grant and with suitable regard to the principle that—

> *"whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the fed-*

eral power must clearly appear. Illinois Central Railway Company, supra. The Commission has no general authority to regulate intrastate rates and *the mere existence of a disparity* between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates." (Italics supplied.)

The Commission's Analysis of the Evidence

It is in the record of the evidence before the Commission that the justification for the exertion of federal power by the Interstate Commerce Commission in this case must be sought. But in that search we can principally rely upon the Commission's own analysis, made in its report (R. 88), for after all, if the Commission's own analysis and findings do not indicate that there was adequate evidence upon which to found the jurisdiction of the Commission to interfere with intrastate rates, either on the basis of any existing undue prejudice as between persons and localities under Section 13 (4) of the Interstate Commerce Act, as amended or as to any burden on interstate Commerce under 13 (4) as construed together with Section 15-a, it is unnecessary to go behind those findings to also show that the underlying evidence was inadequate to support such jurisdiction. That this is so, this Court said in *Florida et al. v. The United States, supra,* as follows:

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has re-

cently adverted (*The Beaumont, Sour Lake & Western Railway Company v. United States*, decided November 24, 1930, 282 U. S. ——), but of the *lack of the basic or essential findings* required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.

* * * * *

"We conclude that the portion of the order of the Commission which is now under review, with respect to intrastate rates, is not supported by the findings of the Commission and this part of the order must be set aside." (Italics supplied.)

The question then is, first, what were the relevant and material findings upon the question of an undue prejudice to persons or localities or any undue burden on interstate commerce.

There Is an Absence of Basic or Essential Findings: The *first report* of January 21, 1927, *122 I. C. C. 133* (R. 12), was in large measure a review of the past history of the maze of inconsistent and chaotic interstate rates on the commodities in question, and of the situation as it then stood. It gave credit to the Georgia Commission for its broad-minded attitude and constructive efforts which had materially improved the prior situation; and on the point of undue prejudice to persons or localities, or burden upon interstate com-

merce, after referring favorably to the Georgia Commission's order of February 25, 1925, it specifically said:

> "Considering the results brought about by this order (the Georgia Commission's order) it could not be found from the record to have brought about a rate situation which has in the past been unjustly discriminatory against interstate commerce."

The *second report* of March 5, 1928, *140 I. C. C. 85*, dealt with interstate rates to and from Florida, and is irrelevant to this proceeding.

The *third report of December 9, 1929, 160 I. C. C. 309* (R. 88), is, therefore, the only place in which to look for any finding which might support the Commission's order therein, and *all* of those findings are as follows (R. 110):

> (1) "We find that the circumstances and conditions affecting intrastate transportation within Georgia and interstate transportation between points in Georgia, and from points in other States in southern territory, except Florida, to points in Georgia are substantially similar.
>
> (2) "We further find that respondents' rates applicable to the intrastate transportation of sand, gravel (washed or unwashed), clay gravel, crushed stone, and slag, in carloads, between points in Georgia, to the extent that they are lower, distance considered, than the interstate rates contemporaneously applicable to the transportation of the same commodities between points

in the State of Georgia, and from points in other states in southern territory, except Florida, to points in the State of Georgia, not exceeding the rates set forth in the appendix to this report and heretofore found and prescribed as reasonable in No. 17517 for the interstate transportation of said commodities, in straight or mixed carloads, according as said respondents participate in said intrastate and said interstate transportation, result and will result in undue preference and advantage of shippers and receivers of freight in intrastate commerce within the said State of Georgia and in undue prejudice to shippers and receivers of freight in interstate commerce between points in the State of Georgia, and points in other states in southern territory, except Florida, to points in Georgia, and in unjust discrimination against interstate commerce.

(3) "We further find that said undue preference and undue prejudice and unjust discrimination can and should be removed by the establishment, maintenance and application to intrastate traffic between points in the State of Georgia of rates which shall not be lower, distance considered, than those contemporaneously applicable to the transportation of interstate traffic between points in the State of Georgia, and from points in other states in southern territory, except Florida, to points in Georgia, not exceeding the rates set forth in the appendix to this report and heretofore found reasonable in these proceedings for said interstate transportation.

(4) "We further find that the rates maintained and applied by defendants in No. 17763 to the intrastate transportation of sand, gravel (washed or unwashed), clay gravel, and crushed stone, in

carloads, from and to points of origin and destination in Georgia, to the extent that they are lower, distance considered, than the interstate rates contemporaneously applicable to the transportation of sand, gravel (washed or unwashed), and clay gravel, in straight or mixed carloads, from Montgomery, Ala., to the same destinations in the State of Georgia, not exceeding the rates set forth in the appendix to this report and heretofore found and prescribed as reasonable in No. 17763 for the interstate transportation by the said defendants of the said commodities from Montgomery, Ala., in straight or mixed carloads, according as said defendants participate in said intrastate and said interstate transportation, result and will result in undue preference and advantage of intrastate shippers between points of origin and destination in Georgia and in undue prejudice and disadvantage to complainant Roquemore Gravel Company at Montgomery in shipping in interstate commerce to the same destinations in the State of Georgia.

(5) "We further find that said undue preference and advantage and undue prejudice and disadvantage can and should be removed by the establishment, maintenance, and application by said defendants on the aforesaid intrastate traffic from points of origin in Georgia to destinations in the State of Georgia of rates which shall not be lower, distance considered, than those contemporaneously applied to the transportation of the aforesaid interstate traffic from Montgomery, Ala., to the same destinations in the State of Georgia, not exceeding the rates set forth in the appendix to this report and heretofore found reasonable in these proceedings for said interstate transportation.

(6) "The evidence presented does not here justify a finding that the minimum weight prescribed by the Georgia Commission results or will result in undue preference and advantage to Georgia shippers or in unjust discrimination against interstate commerce; nor does the record afford a sufficient basis for a finding of undue prejudice respecting the rates from Chattanooga." (R. 110.)

An examination of these findings, and of the Report of which they form a part, clearly reveals what this Court has termed "the lack of the basic or essential findings required to support the Commission's order", in the absence of which "we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit" *(Florida et al. v. The United States, supra)*. To make this fact *the more obvious the following analysis of each finding is respectfully submitted:*

Finding 1: The circumstances and conditions affecting intrastate transportation within Georgia and interstate in and out of Georgia are substantially similar.

Comment: If such a broad generalization means that similar advantages or disadvantages of transportation conditions can be found with respect to carriage within Georgia as with respect to carriage out of Georgia, that might be true, for indeed such a statement would be almost universally true with regard to other states.

If it is intended to mean, however, that every haul between every point of production and every point of consumption is substantially similar, the Court could take judicial notice of the fact so commonly known, that in many respects other than in length of haul the transportation conditions from several competing points of production to a common market or markets vary widely.

Nor is it readily perceivable how a general substantial similarity of transportation conditions within and without Georgia justifies a scale of higher rates per ton per mile from certain points of production than from other points of production to the same common market.

Finding 2: Such intrastate rates as are *"lower,* distance considered, than the interstate rates *contemporaneously applicable"* on interstate traffic, and not higher than the scales theretofore prescribed as *maxima* for interstate traffic, result and will result in (1) undue prejudice to persons and localities in interstate commerce, and (2) unjust discrimination against interstate commerce.

Comment: This finding states a mere conclusion unsupported by a basic or essential finding. Furthermore, since the carriers interstate are required only to observe the interstate scales as *maxima,* with the unrestricted privilege of making rates lower than the scale, when necessary or desirable to meet the competition of rates made by the use of a scale rate applicable to routes shorter in distance, and with no minimum

rates prescribed for interstate application, the carriers intrastate are left in a state of much obvious uncertainty and doubt as to which of their existing rates are and which are not condemned as allegedly resulting in prejudice and discrimination.

Finding 3: Said undue prejudice and unjust discrimination can and should be removed by the application to intrastate traffic of *minimum* rates not lower than those *contemporaneously applicable* to the transportation of interstate traffic, and not exceeding the scales prescribed as *maximum* rates on interstate traffic.

Comment: The same comment made on Finding 2 also applies to this Finding 3 for this finding states another mere conclusion unsupported by a basic or essential finding. In this respect the carriers intrastate are left in an even greater state of obvious uncertainty and doubt as to which of their intrastate rates would or would not be lower than the contemporaneously applicable interstate rates which the carriers interstate are at liberty to lower and vary *in future* from time to time as they deem necessary or proper.

Findings 4 and 5 relate to another case, known as I. C. C. Docket 17763, and are not herein relevant.

Finding 6 is not relevant or material herein.

In the absence of any basic findings essential to justify its conclusions, it is apparent that this proceeding has not been shown to be one in which the Inter-

state Commerce Commission has any jurisdiction to enter an order. This is a proceeding under Section 13 of the Interstate Commerce Act, and the power thereunder of the Interstate Commerce Commission to supersede the rate schedules of the Georgia Public Service Commission and to prescribe schedules of its own to apply to traffic which is wholly intrastate in the borders of the sovereign State of Georgia depends upon the existence of a *substantial* rate disparity which operates as a real discrimination against and obstruction to interstate commerce (*Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563), and there is no sufficient finding in this respect to show that there is any such disparity.

The Commission's Review of the Evidence: Going behind the Commission's findings, the Commission's own review of the evidence in its third report and order, *160 I. C. C. 309* (R. 88), shows that the evidence consisted of nothing more substantial than a mere mathematical calculation which showed that if the interstate scales had been applied to the actual intrastate movements for specified periods there would have been produced a different aggregate revenue, as the following quotations from the review clearly indicate (R. 100):

> "It was *computed* that the 17517 basis of rates, if applied to 2,342 carloads of this traffic which originated in Georgia on the Southern, including shipments received by that line from the Gainesville & Northwestern at Gainesville, Ga., during the four months' period ended August 31, 1928, would have produced $12,000 more revenue than was produced by the application of the Georgia

scale. This is equivalent to $36,000 computed on an annual basis.

"This traffic is important to the Seaboard Air Line. During the year 1927 that line handled 5,213,183 tons of these materials which was equivalent to 25.5 per cent of its total tonnage for that period. The Seaboard has important producing points on its line in Georgia, for example, at Oglesby, Ladds, and Portland, Ga.; and outside of Georgia, within competing range, at such points as Birmingham, Montgomery, and Ragland, Ala.; and at Columbia and Samlay, S. C. During the five months' period ended May 31, 1928, the Seaboard handled 14,892 tons of slag from Alabama producing points to points in Georgia. These slag shipments were charged the 17517 basis of rates and produced revenue amounting to $21,196. The application of the Georgia scale to this movement would have produced $617 less revenue.

"During the six months' period ended June 30, 1928, 23,096 tons of sand and gravel moved from Alabama producing points to Georgia destinations. Most of this tonnage moved from Montgomery. Charges were assessed on these shipments based on the 17517 scales and amounted to $32,778. The application of the Georgia scale to this movement would have produced $2,511 less revenue, or a decrease of 7.7 per cent. During the months of May, June, July and August, 1928, a period immediately succeeding the date when the Georgia scale became effective, 50,687 tons of crushed stone, sand, and gravel originated at producing points in Georgia on the Seaboard and moved to destinations in Georgia. Charges were collected on these shipments based on the Georgia scale. Such charges were $7,307 less than they would have been if based on the 17517 scales. This

is equivalent to about $22,000 computed on an annual basis.

"The Georgia Railroad and the Atlanta & West Point are located entirely within the State of Georgia. There is a large interstate movement of this traffic from the Montgomery district over the Western Railway of Alabama in connection with the Atlanta & West Point. During the year 1927 the Georgia Railroad, Western Railway of Alabama, and the Atlanta & West Point handled 507,753, 714,148 and 379,380 tons of these commodities which constituted 17.03, 29.99 and 20.78 per cent of the total tonnage handled by each respectively during that period.

"During the four months' period ended August 31, 1928, 100,515 tons of these commodities originated on the Georgia Railroad and moved to points in Georgia. Charges were assessed on this movement based on the rates under the Georgia scale. They are shown to be $9,148 less than would have accrued on the basis of the 17517 scales. This is equivalent to approximately $27,500 computed on an annual basis." (Italics supplied.)

As this Court just recently said in *Florida et al. v. The United States, supra,* "the raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage."[1]

[1] In the *Florida Fertilizer Case*, 151 I. C. C. 602, the Interstate Commerce Commission, in refusing to order an increase in the Florida intrastate rates on fertilizer, said: "Furthermore it is not certain that if the Florida intrastate rates were increased to the interstate level additional revenue would accrue to the carriers, for if the prophecies of the interior plants and of the Florida Commission are justified, practically all shipments would be made from the ports with the result that the total charges would probably be no greater than they now are."

And in *Dayton-Goose Creek Railway Company v. United States*, 263 U. S. 456, 479, this Court said:

> "If the weaker roads were permitted to charge higher rates than their competitors, the business would seek the stronger roads with the lower rates, and congestion would follow."

The Joint Line Scale Is the Crux of the Practical Problem: The large Class I carriers, and the *large* producers of sand, gravel and crushed stone with plants on *large* roads, have a common interest in holding for themselves the advantage of the lower single-line scale of rates, and to impose the handicap of a higher joint line scale upon competing production points located on short lines.

Short line railroads and independent producers with plants located on railroads of limited length have a common vital interest in escaping from the imposition on them of the handicap of higher rates per mile of haul than their more powerful competitors enjoy.

The State authorities are interested in restoring a system of one-scale rates and fostering fair and even-handed competition from *all sources of supply*, in furtherance of an ambitious road building program.

These petitioners are not attempting herein, of course, to have the Court substitute its own finding of facts for that of the Interstate Commerce Commission, and the arguments herein have been addressed to the proposition of law, but since the practical questions in

the case are more or less technical, there is offered at the end of this brief as Appendix A some supplementary discussion of single and joint-line rate scales in relation to rate-making for short lines.

The Court can well take judicial notice, however, of the obvious fact that, in the general nature of things, producing points located on long lines of railroad, or branches thereof, can reach an extensive market territory by single-line hauls, whereas producing points on short lines can, as a rule, reach as extensive markets only by joint-line hauls. Hence it is obvious that where there is a materially higher rate scale for joint-line hauls than for single-line hauls, especially on low grade commodities, those producers and carriers which must do much or all of their business under the higher joint-line scales are under an economic handicap.

In the nature of things, short line railroads of the class represented by The American Short Line Railroad Association are usually located wholly within the confines of a single state, and the market radius of such low grade commodities as sand and gravel, produced on their rails, and in which competition is keen, is so narrowly confined as to be almost wholly intrastate. To place short lines, on intrastate movements of sand and gravel, under the burden of the distinctly higher average level of rates of the joint-line scale would seriously curtail the market radius of the producers of those commodities located upon short lines, would shift a large part of the revenue derived from their carriage from the short and weak roads to the longer and stronger lines, and would result in unjust discrimina-

tion against the short and weak roads, indispensable links, as they are, of our national system of transportation.

Hence, this is a striking example of the wisdom of the rule that only in the clearest sort of case will the Federal power interfere, and this is not such a case.

While the record shows that the so-called Docket 17517 scale of maximum interstate joint-line rates is higher than the Georgia intrastate scale to about the same extent that it is also higher than the Docket 17517 interstate scale of maximum single-line rates, there is no evidence of a convincing nature that shippers or localities in interstate commerce were unduly prejudiced by the rates prescribed by the Georgia Commission between points in Georgia, or evidence of any probative force to justify an inference to that effect.

The brief for the Georgia Public Service Commission, Appellants, so well analyzes the evidence which shows that to be the case that further discussion thereof will be omitted herefrom.

In the case of *Florida et al. v. The United States*, *supra*, this Court said that if the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates to end unjust discrimination between persons or localities, and undue burden upon the revenues of the carrier, the Interstate Commerce Commission may make such determination as the situation requires, *acting in accordance*

with the authority conferred by the statute. Similarly, in the case at bar, the Interstate Commerce Commission may reopen the case and take further evidence, if indeed any such could be produced, but on the present record, voluminous though it be, there is no substantial evidence on which to base a finding of unjust discrimination or undue burden.

CONCLUSION

It is undisputed that the Interstate Commerce Commission has the power to enter an order setting aside intrastate rates if it finds that the existing rates cause an undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce, in a real sense and to a substantial degree, *provided* there is substantial evidence to support such findings.

It is respectfully contended, however, that the Commission has not made the requisite findings to support an order setting aside the intrastate rates in Georgia. It is also respectfully contended that the essential and basic findings necessary to support such an order would not be supported by substantial evidence in the record.

It is therefore submitted that upon the entire record the Court below should have entered its decree and order granting the relief prayed for, setting aside the Commission's report and order and enjoining the unlawful schedules of intrastate rates established by the

railroads in Georgia; and that the decree of the Court dismissing the bill is erroneous and should be reversed.

Respectfully submitted,

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APPENDIX A

Uniform Rate Scales vs. Single and Joint-Line Scales

Text: "Crushed stone and related commodities are among the lowest valued commodities offered for transportation and will not move except at very low rates. The movement of these commodities is materially affected by transportation costs, and a slight rate difference is a serious matter between competing producers." (Cosumers Material Corporation v. Atchison, Topeka & Santa Fe Railway Company, et al., 160 I. C. C. 579, 581.)

The Interstate Commerce Commission is in the anomalous position of disapproving as a general rule of rate making the principle of joint-line rate scales on higher grade commodities which could best stand the imposition of the higher joint-line rate, and, at the same time, of prescribing the single and joint-line rate scale formula on the lowest grade commodities, sand, gravel and crushed stone, which can *least stand* the higher joint-line scale.

In other words, a differential on high class traffic is much to be preferred to a differential on low grade traffic, for the reason that the more costly and valuable the commodity the smaller is the relative importance of the freight rate to the commodity. On a commodity like silk, for example, the value is so great that a moderate differential would probably cut little or no figure at all in the competition between dealers

in silk or in the silk markets. But a differential is relatively more serious to carrier and shipper alike (a) the lower the grade of the commodity, and (b) the shorter the haul.

In the *Southern Class Rate Case*, 100 I. C. C. 513, 627, decided July 7, 1925, the Commission discussed the principle of joint line rate scales, saying:

> "Joint-line differentials or arbitraries rest on the *theory* that a joint-line haul costs more than a single-line haul. *But no attempt has been made to measure or even to estimate this extra cost*, and the differentials proposed are the product of unguided judgment. Nor is extra cost in physical handling always incurred. If, for instance, all lines in southern territory were consolidated under a single ownership, it does not follow that the method of operation over what are now joint-line routes would in all cases, or even in most cases, be changed materially. *While joint-line hauls ordinarily involve switching operations at the junction point and sometimes the transfer from car to car of less-than-carload freight, similar operations are common in the case of single-line hauls.* (Italics supplied.)
>
> "As has been shown, the carriers' maximum distance scale is strictly applied only for distances of 200 miles or less. In the case of the many specific rates proposed within the range of the scale and for greater distances, there is no evidence that the carriers have distinguished to any material extent between single-line and joint-line hauls. *Many of the complications which have been urged as an objection to the application of uniform distance rates are created by the joint-*

line differentials. When asked whether such differentials might not be eliminated if the single-line scale were made somewhat higher, a principal witness for the carriers was inclined to answer in the affirmative. As a 'first impression' he stated: (Italics supplied.)

> "'I am rather inclined the way my mind runs to get rid of complicating situations, and this single-line and joint-line scale, both under the carriers' proposal and Mr. Moore's proposal, adds somewhat to the complications. I question if it seriously increases your revenue.'

"We find:

> "*7. That no sufficient reason has been shown for joint line differentials or arbitraries, but that the absence of such differentials is a factor which should be given some weight in determining the level of the distance scale.*"

In the *Consolidated Southwestern Cases*, 123 I. C. C. 203, decided April 5, 1927, the Commission followed the same principles, saying at page 381:

> "Having had a similar situation before us in our investigation of class rates in southern territory, *Southern Class Rate Investigation*, we determined to prescribe a single distance scale of rates to apply locally throughout that territory, disregarding small differences in transportation conditions in different portions thereof, having been of the opinion that *in no other way could*

a reasonable rate structure be established that would be free from undue prejudice and preference as between communities and would afford to each community and territory a fair opportunity to do business in competition with others." (Italics supplied.)

A Joint-Line Scale on These Commodities is Especially Unfortunate: In *Brilliant Sand Company v. Baltimore & Ohio Railroad*, 139 I. C. C. 339, 342, the Commission took occasion to remark upon two very well known facts:

> *"The freight rate is an important factor in the sale of sand and gravel, because of the low selling price of these commodities. They are the lowest grade commodities known to commerce."*

Nevertheless, in the present case, the Commission gave short lines on which sand, gravel and crushed stone are produced the *privilege* of committing suicide by burdening their rates with arbitraries, in competition with producers on trunk roads and in addition it went even further by *requiring*, on Georgia intrastate traffic, the application of higher joint line mileage scales to producers on short lines than the low single line mileage scales which are available to producers on trunk roads.

Important Distinction Between Arbitraries and a Joint-Line Scale: It should be further pointed out that there is a vital difference between (a) permission to add arbitraries, and (b) the prescription of a joint-line scale:

(a) In the case of arbitraries the Commission leaves it to each short line to add same in whole or in part for its own individual benefit, just as the short line finds necessary. The connecting lines participating in the haul have no interest in the differential, so no precedent is involved if the short line puts it on or takes it off.

(b) In the case of two scales of rates, especially where the Interstate Commerce Commission cautions the carriers to stick to same closely because it has made the basic single line scale so low, the short line cannot reduce the joint rate without the consent of the connecting big road or roads, and that is usually impossible to obtain, particularly because, first, the trunk roads do not want to make any exceptions or precedents, and second, the trunk road usually has quarries or pits on its own line. As long as the Interstate Commerce Commission makes itself the "goat" the trunk line is not going to be very eager about voluntarily letting the short line quarry compete with the quarries on its own road on even terms.

The Injury to Short Lines Overlooked: It may well be asked how the almost discarded theory of both single and joint line rates came to be applied to sand, gravel and crushed stone. It seems obvious from the cases that it came about with the best of good intentions on the part of the Interstate Commerce Commission to all of those who appeared to be concerned. The unfortunate producers on short lines (or otherwise so located as to suffer the disadvantage of two-line hauls), did not, however, fully apprise the Commis-

sion of the injury which they would suffer. Hence it is quite evident that the Commission was really thinking only of the conditions on the trunk roads where there were compensating offsets, and did not have before it the conditions on short lines where there are no compensating offsets.

Among the conditions confronting the Commission in the more general of the recent sand, gravel and crushed stone cases has been an inconsistent and more or less chaotic mass of (a) special commodity rates, (b) rates made on combination, and (c) depressed rates induced by political subdivisions. In striving to bring about an orderly situation, the Commission has fixed scales, and in trying to arrive at a happy medium for all interests, it has begun with a low basic scale and endeavored to offset and compensate for that lowness (a) by encouraging the carriers to refrain from making any policy rates to political subdivisions or lesser special rates, (b) by confining the application of the low basic scale to single line hauls only, with joint line hauls on a higher rate level, and (c) by giving "relief" to the short lines through permission to tack on differentials for their own special benefit or suicide.

The Commission, however, explained its justification for the imposition of the joint line rate scales in terms which indicated its own doubt of the wisdom of so doing, thus:

> "In the case just cited we reached the conclusion that no sufficient reason had been shown

for joint-line arbitraries, but that the single scale to be prescribed should be made somewhat higher than if its application were to be confined to single-line routes. A similar conclusion was reached in *Fertilizer between Southern Points, supra.* As was there pointed out, a single scale without joint-line arbitraries has great practical advantages, particularly in simplicity of tariff construction, and can be justified upon other grounds as well. In the case of the commodities under consideration, however, there is perhaps more basis for joint-line arbitraries than in the case of any other form of traffic. *The very low value of these commodities makes the cost of transportation a most vital matter, and it may well be that even the slight increase in rate level over the single-line routes which the elimination of joint-line arbitraries would entail ought to be avoided.* Undoubtedy the greater proportion of this traffic moves over such routes. At all events, we have reached the conclusion that in the case of these commodities joint-line arbitraries may reasonably be permitted, but should be of lesser amounts and disappear at an earlier stage of the scale than the carriers propose. But this should not be construed as an indication that we favor joint-line arbitraries in the case of traffic of higher grade," *Rates on Chert, Clay, Sand and Gravel within State of Georgia,* 122 I. C. C. 133, 164. (Italics supplied.)

Principles of Rate Making for Weak Lines

Text: "Transportation Act, 1920, introduced into the federal legislation a new railroad policy." Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 585.

"The 1920 Act sought to ensure, also adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provision took a wide range." New England Divisions Case, 261 U. S. 184, 189.

"The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. * * * To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission. * * *" Dayton-Goose Creek Railway Company v. United States, 263 U. S. 456, 477.)

In the application of the principle set out in the foregoing texts, the Interstate Commerce Commission in *general* rate revisions since the passage of the Transportation Act of 1920 to which the Supreme Court referred, has manifested a considerate and liberal spirit with respect to short lines, and has expressed that spirit in numerous decisions. It is especially well expressed in *Southern Class Rate Investigation*, 100 I. C. C. 513, 650:

"Certain financially weak carriers of fair size and numerous so-called short lines seek special treatment.

* * * *

"These pleas raise a question of theoretical as well as practical significance. We have heretofore stated that the tendency in recent years has been to give more and more consideration to the national need for a properly coordinated railroad service; that this principle runs through the legislation of 1920; that its application will result in a greater degree of territorial uniformity in rates than would be possible if attention were concentrated on individual railroad properties; and that it assumes that differences in earning power will to a material extent be cared for by adjustments of divisions or through the operation of the recapture clause. *As a practical matter, however, the extent to which weak lines can be afforded relief in either of these ways is limited, and if such lines are to live in decent circumstances pending consolidation with stronger systems, departure from the principle of territorial uniformity in rates must in many cases be recognized.*

* * * *

"The record indicates that with this exception, the weak lines which sought special treatment from the outset in this proceeding are reasonably entitled to such relief and likewise many of the short lines which were represented at the hearing. *Apparently these weak lines and short lines are the objects of quite general sympathy in southern territory, and there is little disposition to question the fact that many of them need special help of some sort.* Most of them are so surrounded by

competitive influences, either of other railroads or of motor trucks, that their charges are limited by other factors than public regulation. *The problems which they face is to locate the point where higher rates begin to result in diminishing returns.*" (Italics supplied.)

In that case, and in certain other cases the Commission authorized short lines to employ the device of arbitraries to give them revenue needed immediately and imperatively, but at the same time the Commission was not without misgivings about the soundness of the method, for in that same decision, at page 653, it said:

"The plan of making through rates to and from local points on a combination or arbitrary basis is open to objection. *Such rates put the territory local to the weak or short line at serious disadvantage* and tend to hamper its development. They also run counter to the theory that the financial necessities of weak lines in such cases should be met by liberal divisions of joint rates." (Italics supplied.)

At page 654 the Commission said further:

"Shippers served by these lines will, of course, be at liberty also to make complaint, but we hope that they will in the first instance bring such complaints to the attention of the State commissions, for *we are desirous, particularly in the case of these little lines, of having the advice and help of the State authorities.* One important reason for believing that the interstate rates of these weak lines and short lines can safely be left to be handled in this way is the fact that, as aforesaid,

the charges which they may impose to their own financial advantage are now limited by other factors than public regulation." (Italics supplied.)

The subsequent course of events has justified the Commission's doubts, and the inexorable logic of the situation has led more and more short lines to relinquish the privilege of adding arbitraries or differentials for the reason that, if a short line is ever to develop and grow, it must be in position to serve the producers, whether they be producers from mines or from factories, at a transportation cost to those producers permitting them to compete on even terms with producers of the same commodities elsewhere.

The adverse effect upon short line traffic of adding short line arbitraries is no less serious than is the imposition of a joint line differential. Both are unsound in principle, a fact which the Interstate Commerce Commission, in the cases heretofore cited, has recognized.

APPENDIX B

THE STATUTES

The Interstate Commerce Act (41 Stat. L. 474; Title 49 U. S. C. Chap. 1.)

Sec. 13. (*As Amended June* 18, 1910, *and February* 28, 1920.)

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Sec. 15a. (*Added February* 28, 1920..)

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for the used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as

hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act* the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

*Transportation Act, 1920.